NO. 80-1934

IN THE

Supreme Court of the United

OCTOBER TERM, 1981

TEXAS, ET AL.,

v.

CERTAIN NAMED AND UNNAM
UNDOCUMENTED ALIEN CHILDREN

ON APPEAL FROM THE UNITED STATES COU
APPEAL FOR THE FIFTH CIRCUIT

APPELLEES' BRIEF ON THE MEI

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Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202

QUESTIONS PRESENTED FOR

1. Whether the alienage provisions of Texas Education Code Ann. tit. 2 (Vern after "Section 21.031", by causing the t certain non-United States citizen children f free public schools, violates the equal pro the Fourteenth Amendment?

2. Whether the total exclusion from a caused by Section 21.031 unjustifiably infr interest thereby violating the due proce Fourteenth Amendment?

3. Whether the alienage provisions of Se pre-empted by federal immigration policy between the State and Federal policies?

4. Whether the alienage provisions of frustrate and conflict with Federal Educa

5. Whether implementation of the alien Section 21.031 violates the procedural pro by the due process clause of the Fourteer

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UNDOCUMENTED ALIEN CHILDREN, E

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I

STATEMENT OF THE CASE

Without ever determining the impact that undc
immigrant children[1] were having on the Texas e
system, defendants enacted and implemented a
1975 restricting public school attendance to ci

---

[1]Throughout this litigation and in their Brief for the Appel
Bf."], Appellants/Defendants ["defendants"] refer to
excluded from the Texas public schools as "illegal aliens

(footnote continued from preceding page)

App. Bf. 8-19. Disposition of this case requires a critica
of the total imprecision with which defendants engrafte
gration and deportation laws into their exclusionary st
"illegal alien" bears no rational relationship with th
immigrants created by the Immigration & Nationality A
U.S.C. § § 1101, *et seq.*, and regulations promulgate
C.F.R. § § 1.1, *et seq.* Nowhere in the INA is the term
mentioned. Instead, the legal ability to retain residenc
States is measured against the deportation statutes
promulgated thereunder. *See, e.g.*, 8 U.S.C. § § 1251-
§ § 241-245, 248-249. Importantly, the question of de
beyond the "legality" of a persons entry into the Unit
until an Immigration Judge reaches a determination t
deportable, the person involved retains the *right* to cont
the United States. *See, e.g.*, 8 U.S.C. § § 1105a, 1242;
Heikkila v. Barber, 345 U.S. 229 (1953); *Shaughnes*
349 U.S. 48 (1955). Immigrants who have entered unlaw
a defense to explusion which can be asserted in deportati
See, e.g., 8 U.S.C. § § 1182(c), 1182(h), 1182(i), 12
1254 and 1259; MITGANG, ALTERNATIVES TO DEPORT
PROVISIONS OF THE I.N.A., 8 U. of Cal. Davis L.Rev. 3
federal district court in *Federation for Am. Immigra*
Klutznick, 486 F.Supp. 564 (D.D.C.), appeal dismisse
(1980), *aff'd mem.*, No. 80-1246 (D.C.Cir. Nov. 6, 19
No. 80-975 (Mar. 23, 1981), recognized that:

> The very concept of "illegal alien" amounts only to a
> of a person who might be deported if his or her p
> known to the authorities. But the determination of t
> can be a complicated process, as numerous cas
> attempts by the INS to beport residents of this cou
> strate. The Immigration & Nationality Act is long
> full of provisos and exceptions.

Id at 573 n.12. Chief Judge Kaufman of the Federal Cou
the Second Circuit has noted the "striking resemblance"
Mino's labyrinth in ancient Crete. . . and the Im
Nationality Act." *Lok v. INS*, 548 F.2d. 37, 38 (2nd C
face of a set of federal immigration laws easily as con
laws, defendants have been at a loss to adopt a coherent
their own statute. The Assistant Commissioner for Edu
responsibile for monitoring and implementing the ch
was questioned at trial about different categories of

"lawfully admitted" immigrants.[2] No wr
history exists concerning the enactment of
Id. at 555 n. 19; R. I at 183, ¶ 10. The Stat
challenged statute primarily serves the "[p]r
state's resources for the education of its law
App.Bf. at 13 and 25. The State's "educati
are primarily evaluated in terms of "educ
tures. . ." *Id.* at 28. However, defendants c
argument that "the state [never] has said th
doesn't have enough money" to educate th
R. XXIV, at 78-79; 501 F.Supp. at 579. A

(footnote continued from preceding page)

entered the United States without inspection, wit
rights under Section 21.031. When faced with the
questions, this witness could only provide his
According to this witness, a child could be exclud
schools because s/he is "an illegal alien." Record o
at 303 [hereinafter, e.g. R. XIII at 303.]. A child
INS documentation but whose presence is known to
be "ineligible" to attend the public schools. *Id.* 34

"A child can be excluded even if her "father is a U
and the child's mother is a documented resident ali
Children Education Litigation, 501 F.Supp. 54
1980). Given this state of affairs, plaintiffs/ap
"plaintiffs"] will use the terms "undocumented
documented children" and "plaintiff-children"
throughout this brief. Our use of these terms *is not*
these children are unlawfully present in the countr
merely use these terms to define the children exclude
schools.

[2]"[P]rior to the passage of the amendment to Sect
the State never had attempted to determine the numb
children attending Texas Public Schools, nor the i
these children upon the [independent] school distri
trial defendants' "impact" arguments assumed
120,000 "illegal alien" children would enroll in the
Section 21.031 to be held unconstitutional. After e

come up with the money." Id. (empha
court concluded that "[t]he evidence
that the State or the [independant] sc
necessary funds" to educate the pla
579.[3] Defendants also argue in this C
principle justification for Section 21

(footnote continued from preceding page)

of pages of exhibits and hearing from five ex
court concluded that this estimate was "bizza
576. Plaintiffs' experts at trial estimated t
undocumented children resided in Texas. *Id*
35.5 plaintiffs are submitting a separate mo
Court that only approximately 12,000 plain
following the issuance of the permanent injun
deposition taken in the district court indicate
no studies to determine the impact of the admi
An independent study funded by the Ford Fo
Corporation and conducted by the Intercultu
Association, relying exclusively upon data
points out that only 47 out of 1,080 indepe
bothered to update statistics on the enr
children, only 37 school districts reported c
50 undocumented children enrolling, and t
enrollments in the handful of districts *most* in
the general declining enrollments in those dis
undocumented students cushioned . . . the
declines . . . [and] enabled some school syste
would have been lost" due to declining enr
DISTRIBUTION OF UNDOCUMENTED PU
SCHOOLS; A FIRST LOOK, 12 (1981).

Given the importance of the facts whi
subsequent to the trial of this case, these Co
remand for further evidentiary findings. 7
Chrysler Motors Corp., ____ U.S. ____ ,
(May 18, 1981); *Coopers and Lybrand v. Li*
473 (1978).

[3]The State budget "showed a closing bala
$2.15 billion for funds that can be appropria
educational purposes. 501 F.Supp. at 580.

inducement for illegal entry." App.
show the total irrationality of thi
defendants stated in their post-tri
Fact: *"Undocumented aliens do*
States in search for a free educ
(emphasis in original).

Three separate district courts ha
review tens of thousands of pag
testimony in search of a ration
exclusion of the plaintiff-children
and the preservation of or incre
portunities available to children
public schools.[4] None of the Co
21.031 justified by even a rationa

It is critically important for t
precisely who is being excluded fr
Texas. Defendants simplistically
citizens in this country can be div
"Legal aliens" and "illegal aliens

---

[4]The third case, not before this Court
School District v. Certain Named and U
Children, No. B-80-234 (S.D.Tex.,
Memorandum filed January 20, 1980,
district court concluded that the Bro
District had failed to establish that the
children would measurably decrease the e
other children. The district court in *In*
Litigation concluded that "[t]he classific
to the achievement of the State's obje
(emphasis added). The District Court in
(N.D.Tx. 1978), found that there was no
Section 21.031 and preserving or impr
available to non-excluded children, and
with this finding of fact. *Doe v. Plyler,* 6

[5]*See* Footnote #1, *supra.*

simple. Defendants agreed with
that "*as a practical matter [*
likely to remain residents of th
future..." Pre-Trial order at 12
district court agreed with plain
plaintiff-children, "for good or
F.Supp. at 558 (emphasis add

**(a) Migration of the Plaint
Parents into Texas.**

Defendants first discuss t
creasing "illegal immigration
"specifically" Texas, harping
government to control immigra
of Texas." App.Bf. at 5-6. Pla
Government[6] agree that the pr
serious one, but plaintiffs b
nificantly mischaracterized bo
and its impact on the State.

Unlawful immigration is ne
problem. It is of a global na
experienced by the United St

---

[6]The United States Government
"has developed and presented to the
to address the problem of illegal i
proposal is the creation of a new lega
in the United States in violation of th
1, 1980. . . If Congress adopts the
thereby sanction the long-term prese
qualify for and attain the status." Br
curiae in No. 80-1538 and Brief for
[hereinafter "U.S.Bf."] at 20-21.

years.[7] The search for emp
undocumented workers, pa
historically been encoura
governments. *See gener*
Cornelius, perhaps the for
migration into the United S
extensive labor recruiting,
laws, the investments and
Mexico, the activities of a
entities on our side of the
The United States has d
Mexican migrants into t
(emphasis added). Joint
P.Int. Ex. 47, at 40 and 6

One government-sponso
forcement of immigration l
economic concerns of ag
businesses from the time
immigration laws were susp
to enter the United States."
that "for generations the
unskilled labor on the Soutl
a long history of deman

---

[7]Plaintiff-Intervenor Exhibit
Council Committee on Illegal
(1976); R. V, at 56; R. VIII, a

[8]The treatment of Mexican
notorious in its abuse of these w
from utilizing Mexican laborers
at 62-63. A recent government
changed much: "*[T]he situation*
person . . . resembles the early s
supra, at 25 (emphasis added).

Defendant's Exhibit
(emphasis added).

As all the parties a
prohibiting the empl
Interestingly enough,
gation which in 1952
included in the Immig
§1324, *exempting*
workers from the crin
172.[9] And, while at l
wide "employer sanct
consistently killed AF
to make the hiring of
state law. D.Ex. 4-12
579 n.88. As State Re
opposition to such le
"represent rural dist
documented workers i
at 150.

(b) Profile of the Temporary Ve

The basic profile o
young, single, adult

[9]"Thus the Southwest
with respect to its use of
federal policy, led to the
Proviso in the Immigra
defines employment of o
as non-harboring activit
the criminal penalties atta
at 13 (emphasis added).

short period of t
studies and experi
undocumented ch
always arrive wi
documented imm
undocumented po
join relatives her
permanently.[11] 50
group of permaner
the United States,
school aged childr
studies have four
undocumented m
United States.[12]

**(c) Children c
Group and**

A fundamental

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[10]501 F.Supp. at 5
(testimony of form
Castillo); P.Int.Ex. 4
59-60; P.Ex. 209 at

[11]P.Ex. 429, at 108
12 at 41; P.Ex. 209
430-31; R. X at 38.

[12]*See, e.g.*, 501 F.
undocumented peopl
14-19, U.S. Comptr
the Budget, at 11 (or
had non-U.S. citizen
E-22 (only 3.4% of
had ever had childre
testifies that "less th

immigrants
stay is that
employment
reunification
(94% of thos
living in the
permanent s
status). Bec
permanent r
the permane
their immigr
the United S
family meml
residence a
preventing
status. R. I
Judge J. Sm

The distri
entered the
Although th
mother "is
documents."
United Stat
who had liv

(footnote cont
in the lower c
inducement to

[13]R. X at 44

[14]The Immig
tions which all
to remain in th
applications, a
takes seven ye
3353.

previously attended public schools in New Jersey and Missouri, applied to attend a Texas public school and was rejected. Id. Her eight year old brother, born a few months after the family moved into the United States, attended a Texas public school.[15] The Immigration Counselor assisting this family testified that he could not even file an immigration application for the girl until he obtained a copy of the mother's Mexican birth certificate, and that no documentation could be obtained from the Immigration Service until the child gained lawful permanent resident status.[16] Former INS Commissioner Leonel Castillo confirmed that it often takes years to obtain just the preliminary documents needed to support an application to the INS, and that applications are often backlogged causing up to "*a seven year wait.*" J.A. at C-30 (emphasis added).[17] The district court noted many of the "undocumented children are not deportable." 501 F.Supp. at 583.

(d) Parents of the Plaintiff-Children Pay Their Share of Taxes Which Finance Public Education

Reserve than seeking to "preserve" resources, the exclusionary statute has the intended (or unintended) effect of providing a "windfall" to those children allowed to enroll in the public schools. Numerous government and private

---

[15]R. XI, 1-33; 7-29 to 31; P.Exs. 272-273.

[16]R. XI, 7-6 thru 7-12.

[17]When told the facts in of this young girl's case, former Immigration Service Commissioner Castillo stated that there was only a "remote" possibility of her ever being deported from the United States. R. VI at 73-74. In fact, this young girl is probably a United States Citizen. *See,* INA §301(e), 8 U.S.C. §1401 (e).

studies agree that the undocumented immigrant worker pays his/her fair share of taxes, while hardly ever utilizing social services.[18] The parents of the named plaintiff-children all pay taxes. P.Exs. 76-100, 109, 115, 119 and 141. Defendants proposed the following finding of fact to the trial court: "*Undocumented aliens who reside and work in the State of Texas are not exempt from state and federal tax requirements.*" R. I at 184, ¶ 14 (emphasis in original).

Public education in Texas is financed primarily through sales taxes and *ad valorem* property taxes. The parents of excluded children, whether U.S. citizens, documented or undocumented workers, are unable to escape the payment of these taxes; they buy consumer goods and they contribute property tax revenue through the ownership of homes and through the payment of rent. R. V at 80-83; R. VII at 431-32; P.Ex. 207 at 6-7.

The State of Texas goes one step further to gain a "windfall", 501 F.Supp. at 586, by refusing to enroll the plaintiff-children. Texas participates in the federal Title I Migrant Project, 20 U.S.C. §§2761-2763, a program designed to provide the element of continuity to the education of children of migratory/agricultural workers.[19] Defendants "recruit" undocumented children and complete federal forms which are forwarded to a federal computer terminal (Migrant Student Record Transfer System - "MSRTS") to identify the residence and educational

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[18]J.A. at E-13 (73.2% of those interviewed payed income tax); J.A. at E-61, (81% had income tax deducted); J.A. at E-38 (90% pay income tax); P.Ex. 455, at 26 (96% pay income tax). This Court has recognized that "aliens, like citizens must pay federal taxes. . ." *Mathews v. Diaz*, 426 U.S. 67, 83 n. 22 (1978). *See* footnote 52, *infra*, for studies on use of social services.

[19]3 U.S. Code Cong. and Ad. New 4113 (1974).

progress of every migrant child in the United States. R. XV, at 1007; R. XV at 1093-94; P.Ex. 249 at 25. As the district court noted, "[t]here is no question that Texas enrolls undocumented children into the MSRTS." 501 F.Supp. at 586. In short, Texas receives money for education from the federal government "because of the presence of children who are excluded from school." *Id.*[20]

No economist could accurately assess the degree to which the undocumented population contribute towards the State's healthy economy. However, the Texas Business Review has concluded that "[i]f illegal Mexican migration to the United States were to cease, . . . *higher labor costs could cause some employment opportunities to disappear altogether, if mechanization became economically feasible. The elimination of jobs now filled by aliens could also result in a loss of complimentary jobs for United States citizens.*" P.Ex. 429 at 108 (1978) (emphasis added).

(e) Availability of Funds for Texas' Educational System

Simply put, Texas enjoys a healthy economy. As of August 31, 1979, the surplus reached $2.15 billion, a 3.7% increase over the cash balance available at the beginning of the year. P.Ex. 204 at 7.[21] The various State funds which are the sources for educational revenues, consistently experience cash balances (surpluses) averaging one billion

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[20] "Of an annual national appropriation of almost a billion dollars, over one-fourth of that amount will be allotted to Texas. Undocumented children account for some of this money." *Id.* at n. 116.

[21] In contrast it might be noted that Texas ranks 42nd of the 50 states in current per pupil expenditures. 501 F.Supp. at 580.

dollars.[22] While defendants belatedly suggest that they not have the resources to provide all children residing in State with the type of education which they presently prov to those allowed enrollment, at trial their expert witnes and counsel freely conceded that the funds to provide equal education for *all* children were available. 501 F.Su at 580; R. XXX at 78-79. With a $2.15 billion ann surplus, enrollment of even 20,000 plaintiff-children cou if the State so desired, have no more impact than a 0.7 reduction in the State surplus.[23]

(e) Educational Needs of the Plaintiff-Children

Defendants suggest that "as many as 99% of [t plaintiff-children are Mexican and may be monolingual Spanish." App.Bf. at 8. And, that "illegal aliens generally lower in educational capabilities than legal migrants." *Id.* These assertions are not supported by the t record, and are totally contradicted by the positions adop by defendants at trial.

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[22]The bulk of the State budget is derived from consumer and prop taxes, primarily the State's sales tax. R. XVI at 1112; *See gener* P.Ex. 204 (1979 Annual Financial Report for the State of Te Monies for education are primarily placed in and disbursed from General Revenue Fund, the Omnibus Tax Clearance Fund, Highway Motor Fuel and Tax Funds, and the Permanent Escrow F R. XVI at 1113; XIX at 2236-37; P.Ex. 204 at 14-15; *see also,* P 276-278 and 300. The General Revenue Fund, with surpluses fo last twelve years, currently has a cash balance exceeding $600 mil R. XXV at 118-19. This surplus alone could finance education hundreds of thousands of children. R. XXIX at 14-15; J.A. at D-

[23]The State provides approximately $800.00 per child to the i pedent school districts. R. XIX at 2255, 2265 and 2268.

Defendants have previously conceded that "*[w]h*
not a student needs bilingual education is . . .
function] of their immigration status." R. I at 18
(emphasis in original). Defendants further concec
"*[t]he educability of a child is a function of his or h*
education and cultural background and not a fun
immigration status." *Id.* at 183, ¶ 12 (emphasis a
An abundant amount of expert testimony at trial, of
both defendant's and plaintiff's expert witnesse
robarates what the district court found: "Nothing ab
immigration status distinguishes [the plaintiffs-c
from other children in terms of their education need
F.Supp. at 583. Indeed, many undocumented
"previously have attended schools in other states.
583 n.104.

An excluded child from Dallas testified entirely in

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[24]Defendants now assume that the entire class of plaintiff c
made up of "illegal aliens" who have seemingly all arri
"Mexico" within the past few weeks. App.Bf. at 9. They fail to
that thousands of class members are children provided an ed
Texas before the challenged statute became operative, and m
children, such as Unnamed Witness No. One, have recently
Texas after receiving education in other parts of the Unit
Defendants' Brief on the Merits to this Court contains
inaccuracies when referencing the record on this issue:
fendants argue that the plaintiff-children are "migratory in
App.Bf. at 9. Defendants first reference is to R. XXV at 6, J.A
wherein the witness is describing migrant children *currently* e
her school. This testimony had absolutely nothing to do wi
alien" children. Secondly, defendants cite D.Ex. 4-16 at 664,
J.A. E-90-94. [Note: At the time of this writing plaintiffs
citations in defendants' brief referenced to the original Record
References to the Joint Appendix have been included where
be easily determined.] Once again, a review of these pa
transcript indicates that the witness was *not* testifying abo
alien" children; (2) Defendants state that "illegal aliens" hav
differences from native Mexican-American students wh

in open Court and exhibited no need for bilingua
R. XI at 48-52 An expert witness in bilingua
testified that based on her experiences less thar
the undocumented children in Texas were r
Spanish speakers. R. XIII at 261. She testified t
of them are going to be [speaking] English. . . [
talking about massive help for everyone of thos
J.A. at C-48-49.[25]

(footnote continued from preceding page)

educational difficulties," App.Bf. at 9, citing D.Ex. 4-16
E-85. A review of the transcript indicates that the testim
the necessity for *newly arrived* immigrants, whether d
undocumented, to learn the American way of life; (3) De
that "as many as 99% of these children . . . may be r
Spanish." App.Bf. at 8, citing D.Ex. 4-16 at 190, J.A. at E
This witness, Sally Dysart, a school teacher, more accu
that there is a wide spectrum in the English dominan
Mexican undocumented children. *Id.* at 663-664. E
concerned children who had been in the United States '
time." *Id.* at 664. That is, children who had been here for
. . ." *Id.*; (4) Another witness cited, Cecilia Salinas, testifi
great difficulty in distinguishing Mexican legal immig
documented immigrants. D.Ex. 4-16 at 711-12; (5) De
that "illegal aliens" further "disrupt bilingual programs.
10, citing R. XXVI at 6. This witness was clearly
difficulties of the bilingual program in light of *migrant* ch
witness was referring to students currently enrolled in
clearly not "illegal alien" children precluded from atten
schools at the time of the trial. *Id.* at 8. In fact, this witn
that "it is tremendous to see the amount of language
speaking students] have acquired in . . . one year" of bilin
Id. at 7; (6) Defendants cite the testimony of INS D
Chambers in support of the view that education provide
to illegal migration. App. Bf. at 11-12, citing J.A. at E-7
this witness, an Immigration Service official, clearly st
never come across *any* undocumented immigrant who
come to the United States for educational purposes. D.I

[25]The Flores-Cardenas study of undocumented famili

The state's past effort to address to the
English-speaking students is so dismal tha
they should now argue that the inadequacy
justify keeping children out of school. *See*
135.[26] While some bilingual programs may
at opitimum level, Mr. Robert Tipton, an ex
defendants, conceded that 90% of the ex
were "adequate". J.A. at D-68.

A bilingual education expert, Dr. Gloria Z
that "team teaching" can be adopted in bil
short of fully certified teachers. R. X
Defendants' expert witness admitted that "
team teaching" are already utilized. J.A.
Zamora testified that the quality of the e
programs would not be decreased if mor
models were adopted. J.A. at C-46. Th
witness agreed that "team teaching is goo
work together. . .Methods don't have to be
attitude has to be the same." R. XXII at

(footnote continued from preceding page)

excluded under Section 21.031 indicated that the
been present in the United States for 6.5 years. J
therefore not surprising that the bilingual needs of th
vary widely. Dr. Albert Pena, an expert witness, co
all [undocumented children] would need bilingual ed
50. Ultimately, the necessity for bilingual educatio
"individual child's needs." R. XIII at 205.

[26]In 1918 the Texas Legislature enacted a law
"[e]very teacher, principal superintendent. . . sh
language exclusively. . . Any teacher, principal, su
other school official. . . failing to comply with thi
deemed guilty of a misdemeanor. . . [and will suffer]
. . ." P.Ex. 135 at 36. Teachers who taught bilingual
"no Spanish rule" (in the Texas State statutes until
jobs and/or revocation of their teaching certificate

when teaching shortages occur, the sta
places. . . [adopted] team teaching. . .'

English as a Second Language ("E
innovative approach to bilingual educat
Part of the instruction takes place in E
teacher can be monoligual in Englis
teaching certificate is required for a tea
227. And, teachers can be trained in ES
five days. *Id.* at 234. A number of exper
that ESL could be adopted as a m
additional enrollment of children o
speaking ability. R. XIII at 211, 244.[2

It should be noted that defendants'
bilingual programs" argument, App.
relevant to 205 out of the 1,100 indepen
in the State of Texas. J.A. at D-64. On
bilingual programs. *Id.*

Defendants briefly raise the issue
classrooms." App.Bf. at 10.[28] Defendan

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[27]The use of bilingual teacher aides is a thir
adopted to accomodate additional enrollmen
Texas State Plan for Bilingual Education, P
utilization of "bilingual paraprofessional aides
teacher in a wide variety of functions. *Id.* a
Brownsville Independent School District testifi
and this "help[s] a lot." R. XXV at 37, 43; *see g*
(testimony of four teachers).

Parents, student teachers from the universit
also be called on to assist in bilingual programs
at C-49-50; D.Ex. 1-42 at 28 (state's e
Community involvement . . . is required at
planning, implementing and evaluating" prog

[28]Defendants cite only one witness on th
Hensley, who did not testify in the trial of this
testimony, P.Ex. 186, it becomes clear th

impact anticipated in "metrop
App.Bf. at 7. Again they c
testimony.

Robbie Collins, an adminis
pendent School District, testifi
historically since 1970 has s
5,000 annual student decline."
are a couple of hundred empty
now." Id. D-39, (emphasis
dependent School District ["
mately 50,000 students in the p

(footnote continued from preceding page)
"immigrant" (i.e. lawful immigrant) cl
clear that his comments concern the
District. *Id.* at 298-300. And, his inf
was obtained from the Superintende
Besterio testified extensively at the t
school buildings in his district. *See, e.*
was to blame for this, he sounded l
Independent School District v. Rodri
that Brownsville did not "have an eq
the State of Texas" J.A. at D-20. And
equalization funds," we're more une
Id. He clearly stated that his distric
with undocumented children." Id.
portantly, Brownsville appears to
problems. Mr. Besterio admitted that
65% of value and could be taxed
education funds. R. XVIII at 204
politically unwise to issue a new bond
2048; App.Bf. at 7 (residents are "tot
to benefit "children that are being a
children lawfully in the school distri

[29]Mr. Collins further testified that
with "less than 87 children . . . and th
J.A. at D-39. Dallas was expecting a
result of an approximate 5,000 stud

15; *see also* D.Ex. 5-18 (HI
30-31 students under capaci
level). An HISD official te
classrooms stand empty in H
was predicting a 4,000 stud
fiscal year 1980-1981. *Id.*

Defendants never establis
size and education opportu
assertions in Appellants' Br
stated at trial that "[t]he res
bare out significant increa
achievement based upon clas
to 15." R. XIX at 2160
professor of education and
that "[t]he addition of a larg
necessarily adversely affect
72.[30] As concluded by the
shown that excluding child
necessary to the improvemer
501 F.Supp. at 583.

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[30]He pointed out that the Sta
additional training to teachers whi
with larger groups of children. R.
effective manager [teachers] w
students." J.A. at D-73. Another
Tipton, has written: "One canno
student ratio . . . Because all teach
amount of time each teacher mu
teaching job varies." D.Ex. 1-
nationally known expert in the fi
quality of the interaction betw
determines the amount of learnin
teacher. R.VI at 253. Echoing a
that "clever management of aides
the largest classroom an exciting
at 253.

(f) Individual and S
Implementation

First, as defendants
severely harmed by bei
R.I. at 184, ¶ 17 (emph
agree with defendants' p
community suffers in
whenever children res
attending school." *Id.*
generally, R. IV at 593
XVII at 1267-68; 501

Evaluating the harm
should be done in light
court finding that they
558. The vast majority
status in this country
accompanying text, *su*
making a person a carri
our society, would not
XVI at 1142-43. The
unable to read and una

According to Dr. Ke
and medical director of
Bexar County, childre
tional system will exhi
"hyperactivity, withdr
breaks with reality." J.
seen by her/his peers to
C-17. Unnamed Witne
came to the United Sta
whose mother is a law
States citizen, is alread

184, victimized by
1267-68.

Expert testimony
society itself was
educational opportu
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plaintiff-children "
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dangerous, both fo
R. VI at 226.

SUMMA

The plaintiff-chi
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118 U.S. a

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[31]Given the
Constitution
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(therein at 8-

228 (1896), a case involving undocumented/deportable immigrants, the Court relied upon *Yick Wo* in finding that the Fifth and Sixth Amendments prevented the enforcement of a law under which a person in the country in violation of the immigration laws could be sentenced to a term of imprisonment at hard labor without the right to a trial by jury:

> In the case of *Yick Wo v. Hopkins,* 118 U.S. 369, it was said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . ." [Its] provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality. . ."

163 U.S. at 237.[32]

In *Mathews v. Diaz,* 426 U.S. 67 (1976), this Court stated:

> The Fifth Amendment, *as well as the 14th Amendment, protects everyone* of these [immigrants] from deprivation of life, liberty or property without due process of law [citations omitted]. *Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.*

Id. at 77 (emphasis added), *citing Wong Wing v. United States, Supra.* As noted by the United States Government, given this Court's holding in *Mathews v. Diaz,* "the consequences of finding the Equal Protection Clause inapplicable to [undocumented] aliens might be that they would be entitled to *less* protection from disparate treatment by the

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[32]Supreme Court Justice Field, concurring in part and dissenting in part in *Wong Wing,* stated that "[t]he contention that persons within the territorial jurisdiction of this Republic might be beyond the protection of the law was heard with pain on the argument at the bar." 163 U.S. at 242-43.

states than by the federal government." U.S.Bf. at 32 (emphasis in original).[33]

Plaintiffs are unaware of a single decision which finds that someone or an identifiable group of people are determined not to be "persons" within the meaning of the Fourteenth Amendment equal protection clause.[34] The lower courts have been almost unanimous in concluding that undocumented persons are protected by equal protection guarantees.[35]

(b) Review of the History of the Fourteen Amendment

On December 6, 1885 Congressman John Bingham introduced a joint resolution proposing a Constitutional Amendment which would "secure to *all persons in every*

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[33]The United States Government argues that "aliens who have entered or remain in the United States in violation of federal immigration law and who are present in a state are 'persons within its jurisdiction' for purposes of the equal protection clause of the Fourteenth Amendment." *Id.* at 28-32. *See Also* LAVALLE, EQUAL PROTECTION AND THE EDUCATION OF UNDOCUMENTED CHILDREN, 34 SOUTHWESTERN L.J. 1229, 1232-35 (1981); FLORES, CANE, VELARDE-MUNOZ, RIGHT OF UNDOCUMENTED CHILDREN TO ATTEND PUBLIC SCHOOLS IN TEXAS, 4 CHICANO L. R. 61, 68-71 (1977).

[34]The time has hopefully long passed when courts will serious entertain questions such as whether "a Negro, whose ancestors were imported into this country and sold as slaves . . . become[s] entitled . . . to sue in a court of the United States." *Dred Scott v. Sandford*, 19 How. 383, 403, 15 L.Ed. 691 (1957). As Professor Chester J. Antieau states, the "Dred Scott decision was buried by the Fourteenth Amendment." ANTIEAU, MODERN CONSTITUTIONAL LAW, §15.39 at 708 (1969).

[35]*See, e.g., Castillo-Felix v. INS*, 601 F.2d 459, 461, 467 (9th Cir. 1979); *Frances v. INS*, 532 F.2d 268, 272 (2d Cir. 1976); *Balanos v.*

State . . . equal protection in their rights, liberty, a property. . ." Cong. Globe, 39th Cong., 1st Sess. p. (1866) (emphasis added).[36] In February 1866 Binghar resolution, somewhat revised, was reported out of Committee of Fifteen to the House. *Id.* at 1033. Wh "citizens" were granted "privileges and immunitie "equal protection" was extended "*to all persons in several states. . .*" *Id.* (emphasis added). Debate lasted three days. The term "persons" was often reiterated insure that "equal protection" would be available to " *persons, whether citizens or stangers,* within this land. *Id.* at 1090 (emphasis added).[37] The February resolution not pass the House, but its essential terms were ag introduced in May, 1866. Its purpose remained the sa

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(footnote continued from preceding page)

Kiley, 509 F.2d 1023, 1025 (2d Cir. 1975); *Holley v. Levin,* 529 F 1294, 1295-96 (2d Cir. 1976) *cert denied* 426 U.S. 954 (197 *Williams v. Williams,* 328 F.Supp. 1380, 1383 (D.V.I. 19 *Martinez v. Fox Valley Bus Lines,* 17 F.Supp. 576, 577-78 (M.D 1936); *Herandez v. Houston Independent School District,* 558 S.W 121, 123 (Tex. Civ. App. 1977); *Commercial Standard Fire Marine Co. v. Galindo,* 484 S.W. 2d 636, 637 (Ct. App. Tx. 19 (undocumented workers in Texas have equal protection rights to rec on workmen's compensation claim).

[36]Congressman Bingham, the acknowledged author of Section 1 o Fourteenth Amendment, was a member of the Committee of Fiftee Reconstruction out of which came the proposed Civil Rights Bill of 1 and the Fourteenth Amendment. Regrettably no record of Committee's discussion was kept in its Journal and legislative his must therefore be gleaned from the debates in Congress.

[37]Equal protection was to be afforded all "freedmen. . . refugees. . . all men. . ." *Id.* at 1292; *Id.* at 2543 (". . . the citizen and the strang all men. . ." *Id.* at 1292; *Id.* at 2543 (". . . the citizen and stranger. . ."); JAMES, JOSEPH, THE FRAMING OF THE FOURTEE AMENDMENT (1956) at 90.

> That great want of the *citizen and stranger,* protec
> by national law from the unconstitutional state er
> ments, is supplied by the first section of the amendn
> *That is the extent it hath,* no more. . .

Id. at 2542 (emphasis added). The amendment was m
provide, *inter alia,* "equal protection" to "all persons
[the] borders [of the States]. . ." *Id.* at 1064 (remarks
Hale) (emphasis added).

The full text of the Fourteenth Amendment came
the Senate in May 1866. *Id.* at 1033. Senator
Howard, a member of the Committee of Fifteen, spo
the resolution. While "privileges and immunities"
reserved for "citizens", due process and "*equal pro
of the laws*" were extended to "*any person, whoever
be. . . [That is,] to all persons who happen to be wit
jurisdiction. . .*" *Id.* at 2765-66 (remarks of S
Howard) (emphasis added).[38]

2. A STATE STATUTE WHICH TARGETS DISCRETE GROUP OF CHILDRE BASED ON FACTORS OVER WHIC THE CHILDREN HAVE NO CONTRO AND TOTALLY EXCLUDES THE FROM PARTICIPATION IN THE EDU CATIONAL SYSTEM, SHOULD E CLOSELY SCRUTINIZED

While plaintiffs agree with the district court,
concluded after an abundance of testimony that

[38]The district court in *U.S. v. Otherson,* 480 F.Supp. 1369 (
1979) found that the term "inhabitant" used in Section 2 of
Rights Act of 1866 includes undocumented persons. The dist
opinion and U.S. Government's brief in that case are contain
record. R. II at 213-258.

classification used is wholly irrelevant to the a
of the State's objective", 501 F.Supp. at 583
added), out of an abundance of caution we will sh
challenged statute should be subject to a
"intensified rationality test . . ." *Id.* at 583 n.

(a) Heightened Scrutiny Is Required B
The Challenged Statute Severely Pe
Children For Matters Over Which
Have No Control

Section 21.031 penalizes children because o
mitted by their parents. 501 F.Supp. at 572.
agreed at trial that "*[t]he parties are aware of no*
which undocumented aliens children have c
United States not accompanied by their pa
Trial Order at 14a, ¶17 (emphasis added).
proposed the following findings of fact in the
Brief: "*There is no reason to believe that ali*
come to the United States not accompanied by t
. . . Undocumented alien children seldom have
choose the place of their residence." R. I at 184 (
original).[39] The right to freedom from punish

[39]The district court heard testimony from a nine-year
entered the United States when she was five months old." 5
73. Her father is a United States citizen and her mo
permanent resident. *Id.* She has no culpability for her
country, is probably a U.S. citizen, 8 U.S.C. §1401
excluded from enrollment. *Id.* Defendants' witness R
Superintendent of a border school district testified that h
come across an undocumented child who was respo
decision to enter the United States or who entered unac
his/her parents. J.A. D-29-30. He noted that "Mexican pe
decisions for their children. . ." *Id.*

absence of personal guilt is a well estab
protected by the Fourteenth Amendment.[40] In
tion cases this Court has consistently applied
rationality test when measuring classification
children for acts committed by their parents

The standard of review used has depended u
severity and rationality of the disability su
classified children.[41] In *Jimenez v. Wienber*
628 (1974), Chief Justice Burger, writing for t
invalid under the Fifth Amendment a Socia
provision which conclusively denied benefits
children born after the onset of a parent's d
classification was not justified by a governm
"compelling or otherwise." *Id.* at 632. In *Mat*
427 U.S. 495 (1976), the Court upheld a S
Act classification which presumed eligibili
children while requiring some illegitimat
produce evidence of dependency. The challe

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[40]*See, e.g., Robinson v. California,* 370 U.S. 660
United States, 367 U.S. 203 (1961); *Wieman v. Up*
183 (1952)

[41]In *Levy v. Louisiana,* 391 U.S. 68 (1968), this C
statute which denied illegitimate children the right
wrongful death of their mothers. The Court conc
invidious to discriminate against [illegitimate childre
conduct, or demeaner of theirs is possibly relevant to
done the mother." *Id.* at 72. In *Weber v. Aetna Cas*
406 U.S. 164 (1972), the Court struck down a
compensation statute denying benefits to certain ille
of covered workers. The Court recognized that the sta
has expressed through the ages society's condemnatio
liaison beyond the bonds of marriage. Howev
condemnation on the head of an infant is illogical and u
And, "legal burdens should bear some relations
responsibility or wrong doing." *Id.*

Lucas did not result in a *total* depriv
rational basis test was applied it was not
Id. at 510.[42]

That the plaintiff-children involved h
wrong-doing has already been conced
With regards the reach of the penalty s
concede what the facts at trial establ
insufficient alternative schools to provid
indigent undocumented alien children. . .
school districts do not allow undocument
enroll in the public schools [even] wi
tuition. . ." R. I at 184. A survey of twe
selected school districts in Texas found
mented children enrolled upon the payn
F.Supp. at 555; J.A. at E-66. In sho
suffered by the plaintiff-children in this ca
total deprivation suffered by the child
Weinberger, and *Trimble v. Gordon.*
determine whether the State's objection i
to support the *Rodriguez* only relative di
ing levels for education were involved. T
"no charge fairly could be made that
provide each child with an opportunity t
minimal skills discriminatory classificati
means used are "substantially related"
purpose.

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[42]In *Trimble v. Gordon,* 430 U.S. 762 (1977)
U.S. 259 (1978), the Court again applied an ele
measure the challenged statutes. 430 U.S. at 76
75. Upholding the classification in *Lalli,* the Co
statute in *Trimble,* which excluded *all* children w
by subsequent marriage, the New York law "is
inevitably disqualifies an unnecessarily large nu
at 273.

**(b) Heighten Security Is Re
Challenged Statute Re
Deprivation Of Educatio**

Few would take issue with this Cou
v. Board of Education, 347 U.S. 4

> [t]oday, education is perhaps the
> tion of state and local governments.
> attendance laws and the great exp
> tion both demonstrate a recognition
> education to our democratic socie
>
> *. . . [T]oday it is a principle instr
> the child to cultural values, in pre
> profession training, and in help
> normally to his environment. I
> doubtful that any child may reaso
> succeed in life if he is denied th
> education.*

Id. 347 U.S. at 493 (emphasis added
Norwick, 441 U.S. 68, 75-78 (197
Sisters, 268 U.S. 510, 534 (1925); *M*
U.S. 390, 400 (1923).

Nonetheless, this Court has state
course, is not among the rights affor
under our Federal Constitution." *Sa
School Dist. v. Rodriguez,* 411 U.

[47]The equal protection clause, however,
those rights explicitly recognized in the bo
also those rights or liberties implicitly secur
Shapiro v. Thompson, 394 U.S. 618, 634
446 U.S. 55, 76 (1980). At the time the
originally adopted, the tradition of universal
at government expense had only begun to
However, while the framers of the Constituti
means of providing education, they were n
crucial role of education in the republican g

Rodriguez only relative differer
education were involved. The C
fairly could be made that the sy
child with an opportunity to acq
necessary for the enjoyment of t
participation in the political proc
Rodriguez no children were deni
conduct of their parents or thei

The History of the Fourteent
basic education was one of th
freedmen which the equal protec
protect.[44] The debates on Sec
Amendment, which contained
protection provisions, indicat
intended to prohibit state statute
the education of their white chil
white are taxed alike for that pur
39th Cong., 1st Sess. at App. 21
Senator Howe). On the final da
Henderson of Missouri describe
which necessitated passage of
ment: "The South saw its opport
Negro. . . [and] denied him th

(footnote continued from preceding page)

created. *See* P. SMITH, THE SHAPING
353; C.F. ADAMS, THE LIFE AND W
198; PERKINSON, TWO HUNDRED
TIONAL THOUGHT (1976) at 44. See fo
text, *infra*.

[44]*See generally,* Brief *Amicus Cu*
Association and the League of the
Supporting Appellees, Nos. 80-1538

forced upon him unequal bur

This Court in *San Antonio* noted that close scrutiny may system "fails to provide each acquire the basic minimum s ment of the rights of speech political process." 411 U.S. that the plaintiff-children do r generally they have no lega "right. . . to implement [a employment." App.Bf. at 24 do have a number of impo directly impacted by their ex system.

First, while the plaintiff-chi employment in a handful o "employer sanctions" laws, prohibited the employment fact, the state has frustrated employment of undocument local efforts at similar legisl F.Supp. at 579 n. 88; R. X mented workers are not only

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[4]Subsequent to passage of the construction Act of March 2nd, Confederate states to reapply fo Congress after fullfillment of cert Texas to representation in provisi its constitution's school provision Article IX of the Texas Constitut shall be the duty of the legislat provisions for the support and ma *schools, . . .[for] all the inhabitant* and eighteen years." (Emphasis a

employment, they are
compensation benefits.
Marine Co. v. Galindo

No court to plaintiffs'
Amendment rights of un
v. Wixon, 326 U.S. 13
the First Amendment ri
tion. Nor have the court
to be inapplicable to u
present in the United St
able searches and seiz
Martinez-Fuerte, 428 U
v. Briginoni-Ponce, 42
federal government no
knowledge restricted ac
alienage. *See, e.g., Bola*
26 (2d Cir. 1975); *Unit*
296 (2d Cir. 1975); *W*
1380 (V.I.D. 1971).
undocumented persons
granted under the Due
supra.

The record in these
plaintiff-children are h
Defendants concede th
precluded undocumente
free schools. And that "

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[46]At least two Federal C
mented immigrants are fu
Relations Act. *See Nationa*
583 F.2d 355 (7th Cir. 19
Apollo Tire Co., Inc., 604 F
Rigging, Inc., 202 N.L.R.B
ment Corp., 209 N.L.R.B.

harmed by being denie
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R. I at 185 (emph
dramatically affect the
now and in the future
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F.Supp. at 561-563. C
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Section 21.031.

(c) Heightened
This Case
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districts in the State
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basis. J.A. at E-65. N
plaintiff-child enrolle

In *San Antonio In*
stated that if elemer
made available only t
"would present a mo
judicial assistance tha
at 25 n. 60. That set
case.[47]

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[47]There is "no evidenc
schools in those districts
tuition." 501 F.Supp. To
children live in school

Earlier decisio
based on wealth
McMillan v. Bo
802, 807 (1969)
U.S. 663, 668 (
(1972) this Cou
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is no alternative

Cases involvi
parallel this cas
deprivation.[49] Si
this Court has c
in total depriva
Antonio Indep
disabilities need
ability to pay in c

(footnote continue

payment of a tuition
at A-9-10; P.Ex. 1
120, 129 and 140, 1
large part due to "a
1197. The U.S. Ci
south Texas for the
in the United State

[48]Defendants con
to provide an educ
184, ¶21.. School
children excluded f
R. XIX at 2255.
children and due to
them away." R. XI

[49]*Tate v. Short*, 4
235 (1970); *Dougl
Illinois*, 351 U.S.

U.S. at 22, t
burden but ra
interest based
ingly, Section

**(d) The
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laws. *Supra*
children who
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demand for c
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State of Tex
purposefully
Dist. v. Rod
indicia of sus
with such di

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[59] "[U]ndocun
charged at comp
conditions." J.
taken advantag
politically." R.

purposeful unequal treatment, or relegated to such a position of political callousness as to command extraordinary protection from the majoritarian political process." *Id.; United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938). The plaintiff-children are politically powerless and "saddled" with awesome disabilities suggesting the appropriateness of heightened scrutiny in this case.[51]

3. THE CLASSIFICATION CREATED BY SECTION 21.031 IS TOTALLY UNRELATED TO THE ACHIEVEMENT OF A LEGITIMATE STATE PURPOSE AND IS THEREFORE WHOLLY IRRATIONAL

Texas offers two justifications for enactment of Section 21.031. They argue that a "principal justification" for exclusing children from the public schools is "prevention of inducements for illegal entry." App.Bf. at 28. They further argue that "preservation of the State's limited educational resources and the dedication thereof to lawful residents" constitutes an important state interests. *Id.* at 25. As the

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[51]This Court recognized in *Graham v. Richardson*, 403 U.S. 365 (1971) that "classifications based on alienage. . . are inherently suspect and subject to close judicial scrutiny." *Id.* at 372. In more recent decisions this Court has held that state schemes barring immigrants from performing functions "that go to the heart of representative government" need only satisfy the rational basis test. *Ambach v. Norwick*, 441 U.S. 68, 74 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978). However, access to a public education cannot seriously be compared with "participation in the political process. . ." *Sugarman v. Dougall*, 413 U.S. 634, 648 n. 13 (1973). The plaintiff-children are generally unable to modify their immigration status, and this is particularly true given the lengthy delays, up to seven years, in the processing of immigration applications. J.A. at C-30.

lower courts have found, Section 21.031 bares no relationship whatsoever to these claimed purposes.

(a) Section 21.031 Bares No Relationship To The Purpose Of Preventing Illegal Migration Into Texas

Defendants come to this Court claiming that a "principal" justification for Section 21.031 is "prevention of inducements for illegal entry." App.Bf. at 28. Yet, defendants straight-forwardly informed the district court that "*[u]ndocumented aliens do not come to the United States in search of a free education—if they did, they would not come to the State of Texas which is the only state in the country which excludes alien children from public schools.*" R. I at 184-85, ¶23 (emphasis in original). The Texas Attorney General informed the district court in *Plyer* that "the basis behind our statute. . . [is] not an effort to control immigration. . ." J.A. at, A-63.

Dr. Wayne Cornelius, probably the foremost expert on the question of Mexican migration into the United States, has concluded that "[t]here is no evidence whatsoever that the availability of health care *or any other kind of public service in the United States* is an important incentive for Mexicans contemplating a move to the United States. Their motives are overwhelmingly income, job, and family-related. They come to the United States to work and get ahead, not to consume public services." P.Ex. 455 at 46 (emphasis added). This observation is corroborated by the multitude of both governmental and private studies which have shown the extremely low number of undocumented immigrants who have children in public schools in this country. *See* footnote

12 and accompanying text, *supra.* Studies have clear shown that undocumented immigrants neither come to t United States because of the existence of social services n do they utilize those services once resident in this country It is wholly irrational for Texas to attempt to discoura illegal migration into the state by excluding innoce children from its public schools while encouraging the infl of undocumented workers to satisfy its "insatiable dema for cheap labor. . ." R. V at 57-58; R. XXVI at 150; P.E 436 at 172.[53]

(b) The Classification Created By Section 21.031 Is Wholly Irrelevant To The Preservation Of Educational Opportunities For Those Lawfully In The Country

Defendants argue that Section 21.031 is rationally relat to the purpose of preserving "that State's limited resourc for education of its lawful residents. . ." App.Bf. at 2 However, as the district court concluded, "the State has n

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[52]J.A. E-41 at 87 (none found on welfare; 1% receiving social secu benefits; none receiving unemployment benefits); P.Ex. 210 at 41 (receiving welfare and 10% receiving unemployment benefits); J.A. E (3.2% receiving welfare); P.Ex. 438 at 133? (0.16% receiving welfa P.Ex. 205 at 18 (2.8% receive welfare; 1.6% receive food stamps; use free medical clinics); P.Ex. 455 at 26-27 (2.3% receive welfare; receive food stamps; 3% use free health care); J.A. at E-15-19 at (U.S. Comptroller General studied 45,000 welfare files in 9 major ci thought to contain high populations of undocumented immigrants found 0.3% receiving welfare).

[53]Aside from the irrationality of this stated purpose, plaintiffs belie is impermissible. While a state may reasonably enact laws impactin migration in order to remedy local interests of great importa *DeCanas v. Bica,* 424 U.S. 351 (1976), it may not legislate for the

shown that excluding children from school is in an necessary to the improvement of the education in the S 501 F.Supp. at 583.

(i) Implementation Of Section 21.031 Ha Had No Impact On The Education Opportunities Available To Childre Allowed To Enroll In The Texas Publ Schools

The Commissioner of the Texas Education A testified that no studies were conducted by either his a or the Texas legislature prior to the enactment of the concerning the possible adverse impact of allowing u mented children to attend the public schools. R. X 1272-73. And, he knew of no data which show academic performance of citizen children had im subsequent to the enactment of Section 21.031. *Id.* at A TEA official responsible for monitoring implemen of Section 21.031 testified that his agency had no d how many children were excluded from the public sch a result of this statute. J.A. at C-52. In short, factual s for the relationship between enrollment of undocur children and the academic performance of citizen chil

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(footnote continued from preceding page)

purpose of discouraging migration or encouraging the migr undocumented persons out of its territory and into other state Court has observed that the "power [over immigration] is veste national government to which the constitution has committed th control of international relations, in peace as well as in war." *United States,* 142 U.S. 651, 659 (1891). The passage of law concern the admission of foreign nationals "belong to Congress to the States." *Chew Lung v. Freeman,* 92 U.S. 275, 280 (187 statute challenged here is made all the more offensive by its fa closely track federal immigration laws. 501 F.Supp. at 565 n.

wholly lacking. Raul Beisteiro, Superintende
Brownsville Independent School District, on
"enclaves" where defendants assume undo
children will concentrate, App.Bf. at 10, candidl
that he had "no way . . . of telling what the real i
be" if the alienage provisions of Section 21.031
unconstitutional. J.A. at D-29, R. XVIII at 207

Quoting lay witnesses, defendants suggest to
that "illegal aliens are generally lower in e
capabilities than legal immigrants." App.Bf. at 9
note 24, *supra.* In contrast, defendants advised t
court that "*[t]he educability of a child is a functio
her prior education and cultural background
function of immigration status.*" See R. I at 183
in original). And, "*[w]hether or not a stud
bilingual education is a function of their abilit
write and speak English and not of their im
status.*" *Id.* at 184 (emphasis in original). These
findings of fact were totally supported by the
admitted at trial.[55] In short, "[n]othing about thei

[54]The State's assumption concerning the potential i
documented children on the public schools was based on
the number of undocumented children residing in Texas. 5
575. Defendants informed the district court that approxima
undocumented school-aged children resided in the State. 5
576 n. 69. After hearing from five expert witnesses, a
various studies the district court concluded that this
"bizzare and untenable. . ." *Id.* at 576. The lower court
findings of various demographers who placed the nu
proximatelly 20,000. *Id.* at 577. In fact, a much lowe
plaintiff-children have enrolled in the public schools. *Se
supra.*

[55]*See generally* Footnote 24 and accompanying text, s
tional needs of undocumented children and documer
"essentially the same"); R. XIII at 205; P.Ex. 185 at 60, 9

tion status distinguishes [the plaintiff-childre
children in terms of their education needs." 5
583.

The trial evidence likewise negates any
enrollment of the plaintiff-children would
classrooms. App.Bf. at 10. In the Dallas
School District "there are a couple of hundre
rooms . . . right now." J.A. at D-39. In
Independent School District approximately 1
stand empty. R. XXVI at 68.[56] Furthermo
never established the current levels of class siz
of Texas, nor the relationship between class si
tional opportunity. In fact, defendants expert
at trial that "[t]he research on achievement do
significant increases or decreases in studen
based upon class sizes until you get to les
R. XIX at 2160-61; J.A. at D-37.

When defendants' expert witness on educ
tunities was asked whether he could say tha
tion of Section 21.031 had resulted in an i
quality of education in Texas, he replied "[n]
XXII at 48. The district court found that defe
it to assume "without any credible supporting
enrollment of the plaintiff-children would ha
impact on the quality of education. 501 F.Sup

(footnote continued from preceding page)

(many plaintiff-children have been in this country virt
lives and have only attended schools in this country); R.
differences between the problem of Mexican-Ameri
undocumented children); R. I at 101-103 (needs o
children a reflection of the length of residence in the c
their immigration status); J.A. at B-40 ("alien child
perform at levels much higher than American-born mi

[56]*See* Footnote 29 and accompanying text, *supra*.

lower court correctly assessed the evide
cluded that

> [t]he State has not shown that excludin
> school is in *any way* necessary to the
> the education in the State. . . The *class*
> *wholly irrelevant to the achievement*
> *objective. McGowan v. Maryland,* 366
> 26, 81 S.Ct. 1101, 1104, 1105, 6
> (1961). . .
>
> . . . The Court has concluded that
> rationality test is appropriate becau
> penalizes children in the absence of indi
> bility or wrongdoing. *Supra* at 572-5
> approach, the means used by the
> substantially related to the achievemer
> mental objective. *Here there is no relat*
> *the classification and the objective*
> *capricious and irrelevant. . .*

Id. (emphasis added).

**(ii) Texas Has Shown No Ratio
ship Between Implementatio
21.031 And A Fiscal Savings
tively Affects Educational O**

Defendants discuss, in very general
impact of Section 21.031 on the financing
State. App.Bf. at 7. The evidence d
however, that "the State or the school
necessary funds." 501 F.Supp. at 579.
State have the money to educate the pl
more importantly failure to educate t
advantage to citizen children—they still h
$800/year spent on them by the State
existence or non-existence of Section 2

Texas enjoys a healthy economy. 5(
XVI at 1112. "On August 31, 1979
showed a closing cash balance of $2.
increase above the $2.08 billion c
beginning of the year." P.Ex. 204 at
The growth in Texas' personal income
that of the nation as a whole. *Id.* at 1

The bulk of the State finance is de
taxes, primarily State Tax. R. XIX
1113.[57] Revenues raised by the State
funds, each fund showing a massive s
balance in the General Revenue Fun
for the Highway Motor Fuel and
$29,512,000, for the Omnibus T
$81,785,000, and for the Perma
$714,124. P.Ex. 300; 501 F.Supp. a

TEA's Foundation School Program
which funds provided by the State Leg
to the independent schools districts. P.
total 1979 Foundation School Prog
$2,106,376,925, "32.5% was suppo
School Fund, 19.3% by the Foundati
48% by the General Fund." P.Ex. 20

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[57]The evidence clearly established that t
children, even when undocumented, contrib
payment of taxes and as consumers contribu
See, Footnote 18 and accompanying tex
(Defendants' Proposed Findings of Fact: "
reside and work in the State of Texas are
federal tax requirements.")

[58]The district court noted that these surplus
completely the education of all undocumente
the State correctly estimated the number of
children" at 120,000. 501 F.Supp. at 580.

Fund is the "major State operati
exercise wide discretion in
deposited in this fund . . ." P.Ex.
termed "automatic financing", t
used for educational expenses if
in the Available School Funds,
Fund. *Id.* at 116. Monies go
districts from the Available Sch
previous year's Average Daily
XIX at 2223. The Foundation S
the basis of current average da

> Once the funds in the Found
> able School Fund] have been
> obligations of the State for
> Program, *there is an auto*
> *General Revenue Fund to m*
> *State under the program.*

R. XVI at 1116 (emphasis adde
Upon additional enrollments
school district can adjust their
additional funding from TEA.
111-112. To the extent that t
available in the Foundation Sch
School Fund, there is an *autom*
Revenue Fund. TEA "has a pr
treasury [i.e. the General Rev
draw is *only about seven hundr*
J.A. at D-47 (emphasis added)

In short, local independent
ticularly the poorer districts, in
tion by *increasing* their Avera
are harmed rather than helpe
resulting from implementatio

generally Appellees' Brief on
(consolidated case) at Section
plaintiff-children need not de
funds available per student at
Texas currently spends appro
attendance. J.A. at D-49. There
children were to enroll in the T
million cost involved could eas
$620,350,053 surplus in the G
conceded by defendants' counse
the state of Texas doesn't have
78-79. "Texas can come up w

In *Shapiro v. Thompson,*
Court stated that a state "cou
expenditures for education by b
its schools." *Id.* 633. The co
certainly not a compelling s
Richardson, supra, 403 U.S
Thompson, supra, 394 U.S. at
children from an education doe
which serves to improve the
available to children currently
schools. From a fiscal standpo
justified by a State interest,
Jimenez v. Weinberger, supra

**(iii) The Long-Term C
Children And The
tion 21.031 Mak
Wholly Irrational**

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[59]The Foundation School Progr
$2,106,376,925. P.Ex. 204 at 11
appropriate additional funds from the
attend the public schools (assuming

Attempting to justify Se
analysis is made all the m
long-term costs to the State
by implementation of Sec
apparent permanent reside
educating the plaintiff-chil

Dr. Kenneth Mathews te
educated, were likely to ult
the criminal justice system,
system, or over-represente
22. The district court in *Ho*
(D.D.I. 1970), reviewing
undocumented children fro
that "[in] the public interes
be avoided . . . [It is] manif
to] develop and foster a
numbers of untutored an
roaming the streets. . ." *Id.*
government:

> The children that illeg
> States, although lacking
> themselves as American
> dreams of upward mobili
> *educational opportunit*
> *skills will not be comme*

(footnote continued from preceding
would reduce the Foundation Sc
per pupil expenditure *may* be
generally 501 F.Supp. at 580.

[60]As already discussed, both
that the plaintiff-children are he
"family reunification in the Uni
of the parents of undocumente
90% intended to eventually se

Such a mismatch co
lems and political pr
illegal immigration u
produce a second ge
frustrated young pe
producing hostilities
those of the 1960's.

*H*OUSE *S*ELECT C*
*L*EGAL AND *I*LLE*
*U*NITED *S*TATES, 9
(emphasis added).[61]

The district court has
the plaintiff-children ex
F.Supp. at 561-62 (the
that the damage caused
United States Commis
Boyer: "[A] man or wo
word is isolated from th
in a tiny world of narro
from the benefits of lif

Given the long-term
tion of Section 21.031,

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[61]The State of Texas
education by requiring the l
suitable provisions for th
system of public free school
Texas legislature has there
institution to provide "eq
within its jurisdiction or geo
Code § 1.04(c) (1978 Sup
school-age is required to
residence. . ." D.T.C.A. E
also imposes criminal pena
school in accordance with t
§ 4.25.

not reasonably be c
McGowan v. Ma
classification creat
reasonable empiri
Lucas, supra, 427
"illogical and unjus
Co., supra, 406 U

3. SECTION
STANTIVE
TEENTH
THE PLAI

Equal protectio
dependent and dist
guarantees of these
many infringement
protections afforde
Virginia, 388 U.
focuses on protec
mental to every ind
procreation, contra
rearing and educati
53 (1973). Where
interests, this Cou
against the state

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[62]Defendants concec
undocumented immigr
Fourteenth Amendme
clusions of Law); *M*
undocumented plaintif
panoply of rights a
Amendment's due pro

Griswold v. Co

In *Meyer v.* that "[w]ithout Fourteenth Am useful knowledg "established dc legislative actio relation to son State. . ." *Id.* at *people have alw knowledge as n be diligently pr*

In *Pierce v.* down a state st 286 U.S. at 57 205 (1972). Th public schools r State." *Id.* 406 (1975) the Co

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[5]The majority c *v. new York,* 198 continued to rely *Pierce v. Society o* similar analytic fr can perhaps be rec realm of family lif and *Pierce* is of gre protected in *Loch* 494, 499 (1977).

[6]Examining the may do much, go citizens, physicall Court concluded "means adopted" homogeneous pec

interest . . ." *Id.* at 574. So fundamental is the liberty interest in education that the denial of access to knowledge and benefits of education also treads on First Amendment rights. This Court stated in *Griswold* that

> [t]he association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyers v. Nebraska, supra,* the same dignity is given the right to study the German language in a private school. In other words, *the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.* . . Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

Griswold v. Connecticut, supra, 381 U.S. at 482-83.[65] The liberty interest harmed in this case is "of supreme im-

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[65]In this case the liberty interest in access to an education is heightened by Article VII, § 1, Texas Constitution, which provides that "[a] general diffusion of knowledge being essential to the liberties and rights of people, it shall be the duty of the legislature of the State to establish and make suitable provisions for . . . the maintenance of an efficient system of public free schools." *See also* footnote 61, *supra.*

In 1954 Chief Justice Justice Warren stated: "Compulsory school attendance laws and the great expenditures for education both demonstrate a recognition of the importance of education to our democratic society." *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

portance. . ." *Meyers v. Nebraska, supra,* 262 U.S. at 400. The importance of this liberty was articulated at the time of the framing of our Constitution and during formulation and passage of the Fourteenth Amendment. *See,* text accompanying footnote 44, *supra.*

Against the deprivation suffered by the plaintiff-children this Court will "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulations." *Moore v. City of Cleveland, Ohio,* 431 U.S. 494, 499 (1977).[66] In this case it cannot even be said that the State has established "an ascertainable purpose and . . . a rational means to achieve that purpose. . ." *Id.* 431 U.S. at 547 (White, J., dissenting).

This Court should reject defendants' claim that a "principle" justification for Section 21.031 is "prevention of inducements for illegal entry." App.Bf. at 28. Defendants themselves took the *opposite* position in the district court, claiming that "undocumented aliens do not come to the United States in search of a free eduation—if they did, they would not come to the State of Texas which is the only state in the country which excludes alien children from public schools." R. I at 184-85. Defendants also stated that "the

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[66]The scope of the inquiry into the State's interests and the means pursued to achieve the interests apparently depends on the relative importance of the interests balanced in a particular case. A teacher facing loss of employment must show "that there is no rational connection" between the governmental interest and the means used to achieve that interest. *Harrah Independent School Dist. v. Martin,* 440 U.S. 194, 198 (1979). However, when important "liberty interests" are at stake, the "usual judicial defference to the legislature is inappropriate." *Moore v. City of East Cleveland, Ohio, supra,* 431 U.S. at 499. The Court will examine "the importance of the governmental interest advanced and the extent to which they are served by the challenged regulations." *Id.*

basis behind our statute . . . [is] not an effort to control [immigration]. . ." J.A. at A-63. In any event, plaintiffs have already argued that such a purpose would be impermissible. *See* Section 3(a), *supra.*

While the State may have a legitimate purpose in preserving its "limited resources for education of its *lawful* resident", App.Bf. at 26 (emphasis added). even this purpose should be impermissible if the State does not define "lawful" in a manner consistent with federal law, or if implementation of the statute involves so much "over inclusiveness or under inclusiveness", *Craig v. Boren, supra,* 429 U.S. at 226 (Rehnquist, J., dissenting), such that the challenged statute only "marginally" serves the stated interests. *Moore v. City of East Cleveland, Ohio, supra,* 431 U.S. at 500.

Section 21.031 is dramatically over and under inclusive. By its terms it does *not* exclude from the public schools a child who entered the United States legally but who is under a *final* order of deportation requiring departure from the United States on a date certain in the future. On the other hand, as has already been fully discussed above, it excludes children who are here to stay like Unnamed Witness No. One. 501 F.Supp. at 573 (the child of a United States citizen and a lawful permanent resident). As noted by the district court, defendants' use of the term "lawfully admitted" is a "monument to ambiguity." *Id.* at 565 n. 39.[67]

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[67]The district court incorrectly notes that the Texas Education Agency "has promulgated guidelines" for the implementation of Section 21.031. At least one *amicus curiae* in support of defendants makes their argument on the basis of this error. Brief of *Amicus Curiae,* The Legal Foundation of America, at 7 ("one must examine the regulations promulgated by the Texas Education Agency"). In fact, as candidly noted by another *amicus curiae* brief in support of defendants, the State

To the extent that Texas wishes to insure that only *bo*
fide residents enroll in the public free schools[68] Sect
21.031 contains the necessary language to achieve t
legitimate interest without prohibiting the plaintiff-child
from access to an education. 501 F.Supp. at 554. T
Section 21.031 has but a tenuous relation to alleviation
the conditions mentioned by defendants is obvious from
fact that it totally excludes "[m]any" children from acces
an education who "are not deportable." 501 F.Supp. at 5

(footnote continued from preceding page)

has only "proposed" regulations interpreting Section 21.031. Bri
Amicus Curiae, Texas Association of School Boards in Suppo
Appellants at 13; while the Legal Foundation of America states tha
regulations have been "promulgated", *Id.* at 7, these "guidelin
reproduced as Appendix "A" in their brief, clearly state that they
"proposed. . ." *Id.* at A-2. A child like Unnamed Witness No. (
would not qualify for enrollment even under these proposed guideli
See R. XII at 5-6, 9-11, 13 (Immigration Counselor with approxima
112 "open" cases similar to that of Unnamed Witness No. One).

[68]At least three *Amicus Curiae* briefs in support of Texas suggest
the alienage provisions in Section 21.031 were enacted to create
objective measure" of *bona fide* residence in the State. Brief of *Am*
Curiae, The Legal Foundation of America at 11; Brief of *Am*
Curiae, Texas Association of School Boards at 8-9, 11; Brief of *Am*
Curiae School Districts, Harlingen Consolidated Independent Sc
District, etc., at 7-9. First, defendants themselves have never sugge
this purpose in any court proceeding. Second, such a purpose woul
wholly irrational in that non-residents can enroll in the Texas sch
upon the payment of a tuition. However, Texas *does not* require sc
districts to admit the plaintiff-children even upon payment of tui
many school districts do not allow enrollment of the plaintiff-chil
even with the payment of tuition. 501 F.Supp. at 555; R. V at
(Defendants' proposed Findings Of Fact). Third, the resid
provisions of Section 21.031 apparently worked well to exc
undocumented non-resident children prior to 1975. 501 F.Supp. at
n. 15 and accompanying text.

n. 103.[69] It cannot be said that Section 21.0 "marginally" services the State's asserted interest "has not shown that excluding children from school way necessary to the improvement of the educatio State." 501 F.Supp. at 583. The due process claus not tolerate a State law which totally precludes ac public education on the sole basis of immigratio while the State concurrently admits that the "*educa child is . . . not a function of immigration status.*" R (Defendants' Proposed Findings of Fact) (emp original).

4. SECTION 21.031 IS PREEMPTED AS CONFLICTS WITH AND FRUSTRAT FEDERAL IMMIGRATION POLICY

The doctrine of federal pre-emption has long vehicle by which state legislation may be struck do invalid encroachment upon an area of federal respo or concern. Such judicial action is a remedy to conflict between state and federal statutes or state an area normally reserved to the exclusive contr federal government. *De Canas v. Bica,* 424 U (1976).

In a "conflict" analysis, the state law is examined to ascertain whether it stands as an obstacle to the

[69]An alternative and far less burdensome approach for T have been to exclude children under final, non-reviewable deportation from enrollment in the public free schools. *See,* CONG. REC. S12286 (Daily Edition, Sept. 10, 1979) (on "legally" within the country eligible for services under Services Corporation interpreted to mean persons who have due process" deportation hearing and "a final determination h been reached" as to their deportability).

ment of a federal purpose. *Perez v. Campbell*, 4(
(1971). *De Canas* involved a challenge to a
statute which prohibited the employment of imm
entitled to lawful residence in the United Sta
LAB. CODE §2805 (West Supp. 1976). In a
opinion, this Court found no indication of a fede
preclude state regulations of "the employme
aliens. . ." 424 U.S. at 358. However, the Cou
the case to the California courts for determinatio
Section 2805 " 'stands as an obstacle to the acco
and execution of the full purposes and objecti
gress' " in enacting the Immigration and Nationa
at 363, quoting *Hines v. Davidowitz*, 312 U.S.
In this case the conflict is clear. Section 21.0
from the public schools children who "are not c
501 F.Supp. at 583 n. 103. And, experts testifi
most unusual for the Immigration and Na
Service to initiate deportation proceedings a
dren." *Id; see generally*, R. XIV at 632-84 (t
Immigration Judge J.R. Smith).

Unnamed Witness No. One, the daughter
States citizen and lawful permanent resident
mentable." 501 F.Supp. at 573; 8 U.S.C. §1

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[10]In contrast to the facts present in this case, the Cou
took note of the "vital state interests," *Id.* at 357, and that
was "tailored to combat effectively the perceived evils."
remanded despite the finding that the State law prohibite
"only with respect to individuals whom the Federal G
already declared cannot work in this country." 424
nevertheless, "there are questions of construction of §
settled. . ." *Id.* The question remained unanswered whet
prevented employment of migrants who, although not en
residence in the United States, "may under federal law
work here?" *Id.* at 364.

she may well be a United States citizen. 8 U
Former Immigration Service Commis
Castillo, correctly testified that the chances
deported from the United States are "remo
73-74; *see* 8 C.F.R. §242.5(a)(3) (childre
and certain immigrants allowed to remain
the American Consul is ready to issue an
The United States Government now takes
Section 21.031 is not, on its face, incor
Immigration and Nationality Act. U.S.
However, they "assume" that Section 2
exclude from enrollment children "permit
law to remain in the United States." *I*
assumption is not supported by the record.
supra; see also R. XVII at 1322 (Commis
tion states that Section 21.031 "is clear a
that the child must be legally in this cour
(Texas Education Agency not able to kee
decisions).

Defendants agree with a plaintiff wit
children . . . return to Mexico when they
education or the instruction they need" in T

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[7]The United States Government states that Sect
empted, "at least to the extent that local school dist
federal law in determining whether an alien child is
alien' for purposes of his/her entitlement to be adm
without payment of tuition." *Id.* at 15-16. The re
failure in this regard. School officials, both repre
local districts consistently testified that they knew
immigration laws. *See e.g.*, R. XVIII at 2075 ("
right to do whatever they please"); J.A. at C-55
have its own policy"), J.A. at 60 (a child in deport
not yet found deportable "ineligible" to attend sc
(school district can implement Section 21.031 "

12-13. Given that many of the plaintifl
deportable", 501 F.Supp. at 583, the
clearly conflicts with federal immig
policy. Despite their belated efforts to br
more in line with federal policy, *see* foot
classification created by the challenged
conflict with federal law. Children are
public schools even though federal regu
continued presence in this country. Sect
be pre-empted under the authority of *D*

5. SECTION 21.031 IS PRE-EMI CONFLICTS WITH AND FR FEDERAL EDUCATION POI

The district court noted that "[t]here
Texas enrolls undocumented children"
student record transfer system, a federal s
of the Elementary and Secondary Educ
("ESEA"), 20 U.S.C. §§2761-2763,
ceives money for education from the f
because of the presence of children who
school." 501 F.Supp. at 586. This "wind
achieved at the expense of the other 49 st
migrant children. This result directly frus
objective of Title I—to provide aid to sch
are truly impacted by concentrations of lo

---

[72]Should this Court believe that the present r
resolve this question, a remand would be a
DeCanas v. Bica, supra, 424 U.S. at 364-65; *T*
Chrysler Motors Corp., ____ U.S. ____ , 49
(May 18, 1981).

cationally-deprived children. 124
(August 23, 1978).

The Title I Migrant Program, 20 U
sub-program within the Elementary
tion Act, involves an on-going effort
the education of every migrant chil
States. 501 F.Supp. at 586. In acco
funding formula, the number of migr
the federal Migrant Student Rec
("MRSTS"), a national computer s
residing within a state during a giv
amount of Title I migrant program f
that state. Federal Register, Appe
52686 (November 13, 1978). Def
mented children in the MSRTS, wit
immigration status when completin
forms. J.A. at C-80. Texas receive
funds than any other state in the cou
of the national federal appropriation
their counting of undocumented chi

One of the primary purposes
Program, is to provide "continuit
migrant children. 3 *U.S. Code Co*
(1974). The undocumented migrant
in a unique position when his parent
he will be counted for purposes of th
funds, the continuity of his educati
Furthermore, the economic "win
State of Texas, takes place at the exp
(and migrant children throughout th
in the federal program.[73] Section

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[73]In 1915 Congress enacted the Impact
seq. As the historical predecessor of the

obstacle to achievement of the p
Migrant Program. *Hines v. Dav*
57.[74]

6. SECTION 21.031 DEP
TIFF-CHILDREN OF
WITHOUT PROVID
PROCEDURAL DUE
GUARDS

In *Goss v. Lopez*, 419 U.S
mandated that a short suspensi
purposes must be proceeded b
signed to prevent erroneous ex

Among other things, the Stat
nize a student's legitimate

(footnote continued from preceding page)

identical policy concept of making fede
school districts to supplement state a
"impact" addressed was the effect of
and employees within a school district,
existence of educationally disadvanta
I. State laws, enacted subsequent to Im
the deduction of federal funds from
otherwise would have been allotted by
districts have been uniformally held to
Clause as a manifest frustration of
Carlsbad Union School Dist. v. Raff
1969), *aff'd.* 429 F.2d 337 (9th Cir.
F.Supp. 1244 (D.Neb. 1969); *Herge*
251 (D.Kan. 1968); *Douglas Ind.*
F.Supp. 849 (D.S.D. 1976); *Shepar*
(E.D.Va. 1968).

[74]Plaintiffs' educational pre-emptio
in their Post-Trial Brief, Constitution
281 (therein at 92-102).

education as property int
Due Process Clause and
for misconduct without
procedures required by

Id. 419 U.S. at 574. Tho
attending the public scho
21.031 and subsequently h
an education. Others are p
the first time. The same
regardless of the circumst

It is necessary to look
defined by state law to dete
legitimate [claim of] entitle
state law mandates atten
schools, and school distric
educational services to all
and 65, *supra*. There is
school in the State of T
Agency should not be per
without some form of pric

Having created a legit
expectancy of benefits, def

---

[7]In *Goldberg v. Kelly*, 397
denied public assistance benefit
of the statute authorizing pa
determined to withhold a benefi
a due process hearing on their el
in *Board of Regents v. Roth*, 4

> The welfare recipients in G
> entitlement to welfare paym
> defining eligibility for them.
> they were, in fact, within the
> But we held that they had a
> attempt to do so.

Id. 408 U.S. at 577.

due process applicatio
titlement.[76] The likelil
substantial given defen
complex body of federal
of training that school
matters, and the lack
pendent school districts
interpreted. At presen
procedures for excludin

Q. Let's say the pers
Mr. Besterio, I v
Immigration Serv
marriage certificat
going to give me
person have any

A. No.

Q. Do you recall ma
[testimony]. . .
attendance office.
really, you know,
I've got to get rea
that I give them tw
call the border pa
and *I don't thin*
anything because
That's the law of
here." Do you re

A. Certainly.

---

[76]In *Greenholtz v. Nebras*
Court held that "the quantu
situation depends upon the
risk of error." *Id.* at 13. A
protected property for liberty
of notice and . . . *some* kind
at 579; *Mathews v. Eldrid*

Q. Do you also
"My intervie
give them fiv
the authoritie
am a firm be

A. Sure.

Q. Is that what

A. Well, *I do*
procedural
here]. . .

J.A. at D-28 (emp

It is unlikely tha
standards of *Goss*
constitutional, ther
due process mech
"five minutes" to
officer makes his '

Without mass li
democracies coul
French Attorney
Education:

> Educators are p
> people to read
> only to draw an
> of society dema
> should not exce
> tion. . .

P.Ex. 301 at 56.

which smacks of
According to St
uses "a lot of u
fields. . ." R. XX
the fields" know

In every chi
circumstances,
tentiality of the
priceless comm
recognized by
withhold this co
toil in its fields
children's paren
citizens and law
conceded throug
stay. Not very l
maintained in a
optimum of di
FRANKLIN, FRO
Texas perhaps h
McCarthy testif

> We are keepi
> manufacturin
> society ten ar
> We are man
> society is to b
> means for ma
> crime. . . [W]h
> increases in t
> . . . in terms of
> will pay this

R.Vol. XII at 1
fails to recogni
destined to play

intentionally designed to create an identifiable group of people, a minority within a minority, who will be illiterate and easily exploitable in the coming years.

The rulings of each of the lower courts should be affirmed.

Respectfully submitted,

TIMOTHY S. BARKER
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